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Supreme Court of the United States

OCTOBER TERM, 1969

No. 925

MORTON GLOBUS, BARBARA D'AMATO, JOHN JACOBOWSKI and BAZYL JACOBOWSKI (jointly), ALFRED OXENFELD, CONRAD TAFF, ROSE SLAYTON, JACK STEINFINK and STELLA STEINFINK (jointly), JACK STEINFINK, HAROLD ALENICK, CECILE GREENBERG and MURIEL PLOTKIN (jointly), BETTY SIMON, HARRY BALTERMAN and CHARLES SEMENETZ, JR.,

Petitioners,

v.

LAW RESEARCH SERVICE, INC. and ELLIAS C. HOPPENFELD,

Respondents,

and

BLAIR & CO., GRANBERY MARACHE INCORPORATED,

Respondent and Third-Party Plaintiff,

v.

PAUL WIENER,

Third-Party Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT AND THIRD-PARTY PLAINTIFF, BLAIR & CO., GRANBERY MARACHE, INCORPORATED

DONALD J. ZOELLER
20 Broad Street
New York, New York 10005
Attorney for Respondent and Third-Party Plaintiff, Blair & Co., Granbery Marache Incorporated

ALLEN R. RULE
MUDGE ROSE GUTHRIE & ALEXANDER
20 Broad Street
New York, New York 10005
Of Counsel.

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BRIEF IN OPPOSITION FOR RESPONDENT AND THIRD-PARTY PLAINTIFF, BLAIR & CO., GRANBERY MARACHE, INCORPORATED

Respondent and third-party plaintiff Blair & Co., Granbery Marache Incorporated ("Blair") files this brief in opposition to the petition for a writ of certiorari filed by Morton Globus, et al. to review a judgment of the Court of Appeals for the Second Circuit rendered on September 8, 1969.

Question Presented

Whether in this case punitive damages are available as a remedy for a violation of §17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), in view of (a) the absence of any statutory authorization of such damages; (b) the verdict of the jury that respondents were not liable for common law fraud; and (c), as to Blair, the absence of clear, unequivocal and convincing evidence of any intentional wrongdoing by Blair.*

Statement

A. The Public Offering and Subsequent Disclosure of Facts Omitted From the Offering Circular

Blair is a brokerage and investment banking firm which engages in the underwriting and sale of securities to the public. On March 15, 1965, Blair made an offering to the public of 100,000 shares of Common Stock in Respondent Law Research Service, Inc. ("Law Research").

The offering was made pursuant to Regulation A of the Securities and Exchange Commission, 17 C.F.R.

* The Petition asserts that a similar question is raised under §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5, but no such issue was decided in the decision of the Court of Appeals for the Second Circuit which is the subject of the Petition. (See Argument I, *infra.*)

§§230.251 *et seq.*, and, in accordance with that regulation, an Offering Circular was prepared and distributed to the public. The Offering Circular was distributed by Blair under its name as underwriter (App. 617a-32a).* The preparation of the Circular and the consummation of the financing followed an investigation and evaluation of Law Research by Blair over a period of several months (App. 197a-203a).

As indicated in the Offering Circular, Law Research was a corporation engaged in the business of performing legal research for attorneys through the use of computers. Blair's first contact with Law Research was in the summer of 1964 when Respondent Ellias C. Hoppenfeld ("Hoppenfeld"), President of Law Research, was introduced to Malcolm Sanders, a Vice President of Blair, and indicated interest in obtaining financing for his company (Tr. 441). In the months that followed, Sanders met frequently with Hoppenfeld and the other officers of Law Research, and made extensive inquiry into its operations, *e.g.*, learning the names and addresses of Law Research subscribers, the dates of their contracts with Law Research and the number of orders from each. Sanders also made inquiries among law firms and bar associations as to the reputation of the company and its future prospects (App. 662a-64a; 202a-03a, 228a-30a).

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* The following abbreviations are used in this brief:

Pet. — Petition of Globus et al. for a Writ of Certiorari.

Op. Pet. — Decision of the United States District Court for the Southern District of New York, and Opinion of the United States Court of Appeals for the Second Circuit, reprinted in the Globus Petition.

App. — Joint Appendix filed on behalf of all the parties in the Court of Appeals.

Tr. — Trial transcript in the District Court.

Sanders learned that computer and programming services were performed for Law Research by Sperry Rand. He asked for, and obtained, a copy of the contract with Sperry Rand and discussed the operations and prospects of Law Research with the responsible Sperry Rand account executive (App. 198a-202a).

Sanders also advised Law Research that it would "be necessary for you to engage the services of a nationally recognized firm of auditors" which must certify the financial statements of Law Research "without exceptions" (App. 662a-64a). Arthur Young & Company was suggested to Hoppenfeld as one of the several accounting firms which would be acceptable and they were subsequently retained by Law Research (App. 203a-04a, 221a-22a).

The results of Sanders' investigations were summarized in a confidential memorandum to Blair on January 27, 1965, and, by letter dated February 4, 1965, Blair expressed its intention to go forward with the financing (App. 700a-05a; 665a-66a). Preparation of the Offering Circular then followed. The Circular was drafted by William Bailey, Esq., of the firm of Nixon Mudge Rose Guthrie Alexander & Mitchell on the basis of the information furnished to him and to Blair by Law Research (App. 421a-26a). It set forth, *inter alia*, a description of the company, its management and prior operations, a statement of the intended use of the proceeds, financial statements certified by Arthur Young & Company and various risk factors to be considered. It described the contract between Law Research and Sperry Rand and the cost of services under the contract, and also noted that Law Research was indebted to Sperry Rand in the amount of $82,285 for key-punching and other

services performed by Sperry Rand in setting up the law information retrieval program (App. 617a-32a).

On March 23, 1965, Blair, as underwriter, purchased the 100,000 shares of Common Stock from Law Research which had been offered to the public. In connection with the purchase, Blair received a certificate signed by Ellias C. Hoppenfeld and Paul Wiener, as officers of Law Research, and an opinion by Hoppenfeld, as counsel to Law Research, to the effect that the Offering Circular was accurate and complete in all material respects (Pl. Ex. 1; App. 231a, 658a-61a). In addition, under the terms of the Underwriting Agreement, Law Research agreed to indemnify Blair against any loss, damage or liability arising out of any untrue statement in, or the omission of any material fact from, the Offering Circular. However, it further provided that Blair would not be indemnified from any liability arising out of its own "willful misfeasance, bad faith, or gross negligence" (App. 711a-13a).

On April 7, 1965, counsel for Blair, William Bailey, received a telephone call from Frank J. Evangelist of the Securities and Exchange Commission. Mr. Evangelist advised Bailey that he had learned of a pending lawsuit by Law Research against Sperry Rand and inquired as to Bailey's knowledge of the suit. Bailey told Evangelist that it came as a complete surprise but that he would look into it (App. 429a-30a).

Immediately following the telephone call, a series of meetings were held by Blair and its counsel with Hoppenfeld and with Herman Goodman of The Franklin Corporation (which had loaned Law Research $125,000). (App. 213a-15a, 394a-99a, 429a; Tr. 527-31, 1051-53). In the course of the meetings, it appeared that:

(a) By letter dated January 25, 1965, Sperry Rand had advised Law Research that, unless it made payment of its indebtedness to Sperry Rand in the amount of $82,897 by January 29, 1965, Sperry Rand would consider the contract terminated (App. 667a-68a).

(b) On January 29, 1965, Law Research had commenced an action against Sperry Rand by service of a summons and, on February 23, 1965, Law Research had filed an affidavit by Paul Wiener charging Sperry Rand with, *inter alia,* breach of contract and fraud and deceit (App. 633a-40a).

After Hoppenfeld had made the foregoing disclosures, Malcolm Sanders and Emmons Bryant of Blair, Herman Goodman of The Franklin Corporation, and Hoppenfeld met with Sperry Rand and its counsel with a view to resolving the differences between that company and Law Research (App. 396a-98a). The discussions were successful and full settlement was reached between Law Research and Sperry Rand. The Law Research suit was discontinued with prejudice and a Supplemental Agreement, dated April 21, 1965, was entered into by Sperry Rand (Tr. 529; App. 681a-95a).

On April 22, 1965, Law Research sent to all stockholders a "Report From The President" which disclosed the existence of the dispute and its resolution (App. 680a). The language of the report was cleared with the Securities and Exchange Commission and the Commission took no action to suspend the Regulation A exemption of the stock (Pre-Trial Order, App. 8a; Tr. 1053-54).

B. Blair's Alleged Knowledge of the Facts Omitted From the Offering Circular

Malcolm Sanders, the Blair officer who was in charge of the underwriting, testified that, prior to the public offering, he had no knowledge of the purported termination by Sperry Rand, of any refusal by Sperry Rand to perform services for Law Research or of the pending lawsuit (App. 184a-87a, 233a-34a). Testimony to the same effect was given by Emmons Bryant, head of Blair's Corporate Department, and by William Bailey (App. 393a-95a, 427a-29a). Sanders, Bryant and Bailey all testified that they first learned of the foregoing facts only as a result of the inquiry from the Securities and Exchange Commission on April 7, 1965, and the meetings which followed (App. 213a-15a, 395a-96a, 429a-30a).

The testimony of Sanders, Bailey and Bryant was corroborated by Fred Johnston of Arthur Young & Company who testified that although he had been advised of a lawsuit, by a letter from Law Research dated February 23, 1965, he had not furnished a copy of the letter to Blair or its counsel, and had not informed them of its contents (App. 370a-73a). Johnston's testimony was also confirmed by a memorandum which he prepared in 1965 and which was subpoenaed by Law Research. The memorandum is a detailed summary of events and conferences concerning the status of the Sperry Rand contract. It plainly indicates that Johnston did not know of the purported termination by Sperry Rand and did not advise Blair or its counsel of the lawsuit commenced by Law Research (App. 706a-08a).

The sole support for a finding of actual knowledge on the part of Blair was provided by the testimony of Hop-

penfeld that he had advised Sanders in February 1965 that Law Research had served a summons on Sperry Rand. However, Hoppenfeld did not claim to have told Sanders the details of the suit or of the Wiener affidavit (App. 107a-12a). Furthermore, Hoppenfeld testified that he did not tell Blair that Sperry Rand had purported to terminate its contract with Law Research or that Law Research had charged Sperry Rand with fraud and deceit (App. 85a-86a, 99a-100a, 164a).

C. Claims for Relief and the Jury's Verdict

Claims for relief were asserted by the petitioners against all respondents under Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a) (1964) and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (1964). In addition, claims were asserted against Blair under Sections 12(1) and 12(2) of the 1933 Act, 15 U.S.C. §§77 1(1) and (2) (1964), and Section 15(c) of the 1934 Act, 15 U.S.C. §78o(c) (1964). A claim for common law fraud was also asserted against all respondents under New York law.

The jury returned a verdict for each of the respondents on the claim of fraud asserted under New York law. However, they found for each of the petitioners on the claims asserted under Section 17(a) of the 1933 Act and Sections 10(b) and 15(c) of the 1934 Act and awarded total compensatory damages, including interest from June 3, 1965, in the amount of $32,591.14 against Law Research, Hoppenfeld and Blair, jointly and severally. In addition, they awarded "punitive damages" against Hoppenfeld in the total amount of $26,812.06 and against Blair in the total amount of $13,000 (Judgment, App. 593a-607a).

ARGUMENT

I.

The decision below does not raise the issue of whether punitive damages are available under the 1934 Act.

Petitioners attempt to bring themselves within this Court's Rule 19 (Considerations Governing Review on Certiorari) by introducing the extraneous question of whether punitive damages are available as a remedy under the Securities Exchange Act of 1934.*

The availability of punitive damages under the 1934 Act was not a question presented to the Court of Appeals in this case, and it was not the subject of the decision rendered by the Court of Appeals.

The Petition (p. 5, fn. **) acknowledges that this issue was not before the Court of Appeals by noting the following:

> "The Trial Court had instructed the jury that punitive damages were awardable under the 1933 Act, but not under the 1934 Act. Plaintiffs argued at trial that punitive damages were also awardable but, naturally, did not appeal that ruling in view of the jury's favorable award under the 1933 Act."

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* Thus, the Petition (p. 2) asserts that this case involves the following "Question Presented":

> "2. As a corollary question, although not vital to a determination of the primary question, whether in an appropriate case punitive damages are available as a remedy for a violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5."

Of course, the jury verdict did not award damages under the 1934 Act.

Thus, the "issues of great importance" noted at the outset of the Court of Appeals opinion (Op. Pet. A-24), and relied upon in the Petition (pp. 6-7) as the first reason for granting the Writ, do not include the issue of punitive damages under the 1934 Act.

The Court of Appeals, citing *Green* v. *Wolf Corp.*, 406 F.2d 291 (1968), *cert. denied* 395 U.S. 977 (1969); and *Meisel* v. *North Jersey Trust Co. of Ridgewood, N.J.*, 216 F.Supp. 469 (S.D.N.Y. 1963), merely restated in dictum its own previously established rule that "punitive, or exemplary damages, as they are sometimes called, are not available for violations of § 10(b) of the 1934 Act." (Op. Pet. A-34).

In a further attempt to bring themselves within this Court's Rule 19, Petitioners compound their misplaced reliance on the 1934 Act by arguing as a third reason for granting the Writ that "The Court of Appeals' decision creates uncertainty," (Pet. p. 9). Two of only four decisions cited to support this proposition are *Hecht* v. *Harris, Upham & Co.*, 283 F.Supp. 417 (N.D. Cal. 1968) and *de Haas* v. *Empire Petroleum Co.*, 302 F.Supp. 647 (D. Colo. 1969).

The *Hecht* case stated in a dictum that punitive damages might be allowed in a proper case based upon the 1934 Act, but concluded they were unnecessary in that case, 238 F.Supp. at 444-45. The *de Haas* opinion denied a motion to set aside a jury's award of punitive damages under Section 10(b) of the 1934 Act, 302 F.Supp. at 648-49, and the 1933 Act was not involved.

Thus, whatever uncertainty in the law might arguably arise from the *Hecht* and *de Haas* decisions, they involve issues which are not germane to the Petition or the decision below by the Court of Appeals.

II.

The decision below is clearly correct in holding that punitive damages are not available under the 1933 Act.

The Provisions of the Act. Neither the Securities Act of 1933 nor the Securities Exchange Act of 1934 contains any express provision affirmatively authorizing an award of punitive damages.

The 1934 Act does contain an express limitation on damages,* so the District Court concluded that punitive damages were not awardable under the 1934 Act (Op. Pet. A-7-8). See also, Op. Pet. A-34 and *Green* v. *Wolf Corp.*, *supra.*

Even though the 1933 Act does not contain an express limitation similar to Section 28(a) of the 1934 Act, a right to punitive damages under the 1933 Act cannot be implied and should not now be created judicially.

The Intention of Congress. Nothing in the legislative history of the 1933 Act suggests that Congress ever intended to create a right to punitive damages.

The District Court purported to derive a "legislative design" from the fact that the 1933 Act contains no limita-

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* Section 28(a) of the 1934 Act provides, in part, that "no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of." 15 U.S.C. § 78bb.

tion comparable to Section 28(a) of the 1934 Act (Op. Pet. A-8). Thus, the Court suggested that Congress deliberately undertook to make the 1934 Act less burdensome out of concern over a possible "strike" (*i.e.*, that issuers would seek to avoid the provisions of the Act by not listing new securities). On the contrary, however, the legislative history of the 1934 Act indicates that, to the extent that Congress was concerned by a possible "strike", it moved to meet that threat by regulating the over-the-counter market. (See H.R. Rep. No. 1383, p. 16, Sen. Rep. No. 792, p. 6, Sen. Rep. No. 1739, p. 3, H.R. Rep. No. 2601, p. 4, 73d Cong. 2d Sess. (1934)).

Moreover, it is clear that when the 1934 Act was enacted, Congress could not have believed that punitive damages were recoverable under the 1933 Act. As pointed out by Friendly, J., concurring in *SEC* v. *Texas Gulf Sulphur,* 401 F.2d 833, 867 (2d Cir. 1968), the unanimous view of commentators at that time was that Section 17(a) of the Act was intended to provide only a basis for injunctive relief or criminal liability and was not intended to supplement the civil liabilities created by Sections 11 and 12 of the Act. And the civil liabilities imposed by Sections 11 and 12 of the Act were, by their terms, limited to compensatory damages.

In any event, there is no indication that the language of Section 28(a) of the 1934 Act reflected a belief by Congress that punitive damages were allowable under the 1933 Act. Congress could easily have provided expressly for such damages under the 1933 Act if that had been intended.

In *United Mine Workers of America* v. *Patton,* 211 F.2d 742 (4th Cir. 1954), the court rejected a claim for punitive damages asserted in connection with a claim under the

Federal Labor Management Relations Act. Pointing out that the statute made no provision for damages, the court observed that, where Congress had intended to create a right to such damages, as in the patent and anti-trust fields, "it has found no difficulty in using language appropriate to that end." *Id.* at 749. Similarly, in *Burris* v. *International Brotherhood of Teamsters,* 224 F.Supp. 277 (W.D.N.C. 1963), the court held that "absent express Congressional intention punitive damages [are] not recoverable when invoking the jurisdiction of the court on a federally created cause of action." *Id.* at 280. Accord, *Cole* v. *Hall,* 35 F.R.D. 4 (E.D.N.Y. 1964).*

While we fully concur with the decision of the Court of Appeals in denying punitive damages based upon a broader analysis of the role they would play in the statutory scheme established for the enforcement of the Securities Act (Argument V, *infra*), we also submit that the decision below is clearly correct based upon the language and history of the Act and established rules for statutory construction.

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* The District Court found some authority for the proposition that punitive damages may be awarded in a federal action without express legislative authority. (See *Mansell* v. *Saunders,* 372 F.2d 573 (5th Cir. 1967); *Basista* v. *Weir,* 340 F.2d 74 (3d Cir. 1965); *In re Den Norske Amerikalinje A/S,* 276 F.Supp. 163 (N.D. Ohio 1967). However, we submit that the conclusion reached in the *United Mine Workers* and *Burris* cases is the better reasoned view and should be followed here. It is significant that *Mansell* v. *Saunders, supra; Basista* v. *Weir, supra;* and *In re Den Norske Amerikalinje A/S, supra,* each involve a non-commercial situation in which punitive damages were awarded to a small and distinct number of persons who had suffered serious personal injury or deprivation of constitutional rights under extremely aggravated circumstances. No other type of case has allowed punitive damages under a federal statute in the absence of express legislative authority. Compare the decision below, Op. Pet. at A-38-39, and *Roginsky* v. *Richardson-Merrell, Inc.,* 378 F.2d 832, 838-40 (2d Cir. 1967) where larger classes of potential plaintiffs are involved.

III.

The decision below is not in conflict with other case law.

Petitioners argue that "the Court of Appeals' Decision creates uncertainty" (Pet. p. 9). Two of the four cases upon which this assertion is based, *Hecht* v. *Harris, Upham & Co., supra,* and *de Haas* v. *Empire Petroleum Co., supra,* involve only the Securities Exchange Act of 1934, and therefore raise issues which are in no way germane to the petition (See Argument I, *supra*).

The third case said to create "uncertainty," *Green* v. *Wolf Corp.,* 406 F.2d 291 (2d Cir.), *cert. den.* 395 U.S. 977 (1969), contained the dictum that punitive damages might be allowable under the 1933 Securities Act (citing the District Court opinion in this case), but this dictum was unequivocally repudiated by the same Court of Appeals in this case.*

The fourth case said to create "uncertainty," *Nagel* v. *Prescott & Co.,* 36 F.R.D. 445 (N.D. Ohio, 1964), did not sanction punitive damages under any federal securities

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* "Our opinion in *Green* v. *Wolf Corp., supra,* does contain some language indicating such a dichotomy does exist and that punitive damages may be permissible under the 1933 Act. 405 F.2d at 303. However, it is obvious to the careful reader that this was merely dicta intended to limit the holding in *Green* to the specific issue then before the court, i.e. the validity of punitive damages in an action based on § 10(b) and Rule 10b-5 of the 1934 Act and not as approval for the award of punitive damages under the 1933 Act. As we have demonstrated, *supra,* the reasoning of *Green* is completely consistent with our holding here. As to the legislative history on which Judge Mansfield purported to base the discrepancy between the two acts, see 54 Va. L. Rev. 1500 (1968)." (Op. Pet. A-40)

laws, but held that such damages might be awardable in a tort action based on Ohio law.

In *Nagel,* the court recognized that "there is no provision in the Securities Act authorizing recovery of punitive damages. . . ." *Id.* at 449. However, the court indicated that, by reason of the "savings clause" of the Act, punitive damages could be allowed to the extent permitted by state law.* The court then analyzed Ohio law and concluded that Ohio would allow the imposition of punitive damages under the facts there alleged.

It is not necessary to linger over the propriety of a rule which allows an award of punitive damages under state law when the underlying cause of action is based upon the federal securities laws. Under the applicable state law in this case, that of New York, it is clear that punitive damages are not allowable.

Prior to *Walker* v. *Sheldon,* 10 N.Y.2d 401 (1961), it was well settled in New York that punitive damages were not allowed in fraud cases. *Oehlhof* v. *Solomon,* 73 App. Div. 329, 76 N.Y. Supp. 716 (1st Dept. 1902); *Toho Bussan Kaisha, Ltd.* v. *Am. President Lines,* 265 F.2d 418, 76 A.L.R. 2d 1344 (2d Cir. 1959). In *Walker* v. *Sheldon,* the New York Court of Appeals carved out a limited exception under the following circumstances:

> "The pleading charges that defrauding the general public into entering publishing contracts, such as the one involved in the present case, was the very basis

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* Section 16 of the 1933 Act, 15 U.S.C. § 77p (1964), provides that:

> "The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."

> of the defendant's business. What is asserted is not an isolated transaction incident to an otherwise legitimate business, but a gross and wanton fraud upon the public." 10 N.Y.2d at 406, 223 N.Y.S.2d at 492.

The dissimilarity of the present case to *Walker* v. *Sheldon* is striking. Whatever view is taken of the facts alleged and proved herein, it is undisputed that the Law Research offering was no more than an isolated transaction incident to the admittedly legitimate business of Blair. The inapplicability of *Walker* v. *Sheldon* is further underscored by the fact that the jury's verdict for respondents on the common law fraud claim was clearly based on a finding that there was no proof of an intent to defraud.

In *Walker* v. *Sheldon,* the assumption of an intent to defraud was central to the rationale of the court in permitting the award of punitive damages:

> "Exemplary damages are more likely to serve their desired purpose of deterring similar conduct in a fraud case, such as that before us, than in any other area of tort. One who acts out of anger or hate, for instance, in committing assault or libel, is not likely to be deterred by fear of punitive damages. On the other hand, those who deliberately and coolly engage in a far-flung fraudulent scheme, systematically conducted for profit, are very much more likely to pause and consider the consequences if they have to pay more than the actual loss suffered by an individual plaintiff." 10 N.Y.2d 406.

Clearly, one cannot "deliberately and coolly engage in a far-flung fraudulent scheme" without an intent to defraud.

In sum, there is no basis within the case law applying the federal securities acts for permitting the award of punitive

damages. And even if one accepts the rather doubtful thesis of *Nagel* v. *Prescott & Co., supra,* that state law may be invoked to permit the award of punitive damages, it is perfectly clear that the law of New York would not permit punitive damages to be awarded under the facts of this case.

No other cases noted by Petitioner suggest a conflict between the decision below on punitive damages and other case law, and we know of none.

IV.

The decision below is in accord with the teachings of this Court.

The Petition (pp. 7-9) asserts that there is an inconsistency between the decision of the Court of Appeals and the decision of this Court in *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964) and two cases quoted in *Case* v. *Borak, Bell* v. *Hood,* 327 U.S. 678 (1946) and *Deckert* v. *Independence Shares Corp.,* 311 U.S. 282 (1940). The principle which Petitioners correctly derive from these cases is that the courts should be alert to provide remedies to make federally secured rights effective.

The point is that as to these Petitioners the Court of Appeals did have the power and did "make the right of recovery effective," *Deckert* v. *Independence Shares Corp., supra,* 311 U.S. at 288; and the Court of Appeals was able to and did "grant the necessary relief," *Bell* v. *Hood, supra,* 327 U.S. at 684; and the Court of Appeals has "provide[d] such remedies as are necessary to make effective the congressional purpose," *J. I. Case Co.* v. *Borak, supra,* 377 U.S. at 433.

The jury awarded to Petitioners an aggregate sum of $32,591.14 in compensatory damages. This verdict was allowed by the District Court and by the Court of Appeals, and no effort has been made to challenge it in this Court. No assertion is made in the Petition that these compensatory damages were insufficient in amount.

In *S.E.C.* v. *Capital Gains Bureau*, 375 U.S. 195 (1963), also relied upon in the Petition (p. 8), this Court again applied securities legislation "not technically and restrictively, but flexibly to effectuate its remedial purposes." There again, the Court was concerned with providing an effective remedy where, unlike the present case, the court below had found that no remedy was available.

Moreover, in the present case, the Court of Appeals has not been "technical and restrictive"; rather, it has based its decision on an extensive analysis of the role which punitive damages would play in the entire statutory scheme established for the enforcement of the Securities Act. (See Op. Pet. A-36-41).

V.

The Court below correctly held that punitive damage recoveries are not necessary for the effective enforcement of the 1933 Act.

We submitted in Argument II, *supra,* that the decision below is clearly correct based on the language and history of the Securities Act of 1933. The Court of Appeals also concluded as follows:

> "Since even in this day of easily implied liability under the securities acts, it is not settled to everyone's satisfaction that compensatory damages are authorized by 17(a), it would no doubt jolt and startle the draftsmen of the 1933 Act to be told that they also authorized the recovery of punitive damages when that section was formulated." (Op. Pet. A-36.)

The Court of Appeals further concluded, however, that "neither Congressional mind-reading nor stenciling the bounds of the express liability sections onto § 17(a) provide a firm basis for decision" (*ibid.*), and that "the seminal question is whether punitive damage recovery is necessary for the effective enforcement of the Act" (Op. Pet. A-37).

The court below has correctly answered this "seminal question".

The "arsenal of weapons" necessary to perform the functions of retribution and deterrence under the Act are sufficient without punitive damages.

> "The 1933 Act provides not only for a fine but five years imprisonment for those who violate 17(a). 15

U.S.C. §77x. Moreover, the SEC may suspend or expel those who violate the securities acts or suspend trading in a particular stock. Furthermore, private actions often lead to sizable recoveries and to considerable deterrent clout. In *Green* v. *Wolf Corp., supra,* we recognized that a class action under Fed.R.Civ.P. 23 could be particularly effective and appropriate in remedying violations of the securities acts when the injury to any individual was not large enough to provoke him to legal action. Thus a recurring rationale for punitive damages—that the lure of a windfall is required to encourage suits to enforce the Act—has lesser impact where the class action for the small litigant would be appropriate. Compensatory damages, especially when multiplied in a class action, have a potent deterrent effect. And there always lurks the psychological deterrent of being branded a knowing violator of the law. This is particularly true in an industry where, as the sages put it, a good name is worth more than a crown. Cf. *Stevens* v. *Abbott, Proctor & Paine,* 288 F. Supp. 836 (E.D. Va. 1968)." (Op. Pet. A-37-38.) (Footnote omitted.)

Against this unneeded or "marginal" deterrent the Court of Appeals weighed "the potentially awesome injuries that [punitive] damages may impose" on "an otherwise honest underwriter or issuer who egregiously erred in one instance which affected many" (Op. Pet. A-38).

The recent decision of the Court of Appeals for the Second Circuit in *Roginsky* v. *Richardson-Merrell, Inc.,* 378 F.2d 832, 838-42 (1967), provides compelling reasons why, at least in the absence of a clear legislative mandate, punitive damages should not be made available under the type of claim asserted in the present action.

"In *Roginsky* * * * this court denied punitive damages in an action charging a drug manufacturer with

irresponsibility in marketing a drug which injured hundreds of people. The opinion emphasized that punitive damages are normally awarded in situations where there is only a single injured party and thus the total amount of punitive damages may be kept to a reasonable level. A single misstatement or omission in a prospectus or offering circular, although less dangerous than a drug, may leave those responsible liable to literally thousands of purchasers.

"Nor does there appear to be any way for us to fairly restrict the punitive award. It may not always be possible to circumscribe all possible plaintiffs in a single suit. Nor can we predict how many suits will arise from any particular violation. And, as *Roginsky* points out, 'We know of no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments.' 378 F.2d at 839. Even if such a principle were valid we would have some doubt about the propriety of providing a windfall to the first litigant to chance upon a sympathetic jury." (Op. Pet. A-38-39.) (Footnotes omitted.)

Finally, the Court of Appeals noted that:

"To permit punitive damages under the 1933 Act would create an unfortunate dichotomy between the 1933 and 1934 Acts. Section 28(a) of the 1934 Act prohibits punitive damages in actions brought under that Act. But the 1934 Act is the only basis upon which defrauded sellers of securities could obtain relief, see *Royal Air Properties* v. *Smith,* 312 F.2d 210 (9th Cir. 1962); 17(a) of the 1933 Act by its terms only provides protection to purchasers of stock who are damaged by fraud. Allowing exemplary damages under the 1933 but not under the 1934 Act would create an unreasoned split between buyers and sellers of securities subjected to fraud of an equally heinous nature.

"To avoid such inconsistencies, courts have endeavored to treat the '33 and '34 Acts *in pari materia* and to construe them as a single comprehensive scheme of regulation." (Op. Pet. A-39-40.) (Footnote omitted.)

We respectfully submit that the court below has properly delineated that "single comprehensive scheme of regulation" as it applies to this case.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

DONALD J. ZOELLER
20 Broad Street
New York, New York 10005
Attorney for Respondent and Third-Party Plaintiff, Blair & Co., Granbery Marache Incorporated

ALLEN R. RULE
MUDGE ROSE GUTHRIE & ALEXANDER
20 Broad Street
New York, New York 10005
Of Counsel.

January 19, 1970

CERTIFICATE OF SERVICE

I, DONALD J. ZOELLER, hereby certify that copies of the foregoing Brief in Opposition for Respondent and Third-Party Plaintiff, Blair & Co., Granbery Marache Incorporated, have been served on counsel by mailing copies by United States mail, postage prepaid, to Herman E. Cooper, Esq., Messrs. Cooper, Ostrin, DeVarco & Ackerman, Counsel for Petitioners, 655 Madison Avenue, New York, New York 10021, and Alfred S. Julien, Esq., Messrs. Julien, Glaser & Blitz, Counsel for Respondents other than Blair, 2 Lafayette Street, New York, New York 10007, this 19th day of January, 1970.

DONALD J. ZOELLER